

Message Text

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INFO OCT-01 ISO-00 MCT-01 JUSE-00 IO-13 CIAE-00
DODE-00 PM-05 H-01 INR-10 L-03 NSAE-00 PA-01
SP-02 SS-15 NSCE-00 SSO-00 ICAE-00 INRE-00 /064 W
-----103645 041704Z /41

O R 041450Z APR 78
FM USMISSION USBERLIN
TO SECSTATE WASHDC IMMEDIATE 6545
AMEMBASSY BONN IMMEDIATE
INFO AMEMBASSY BERLIN
AMEMBASSY LONDON
AMEMBASSY MOSCOW
AMEMBASSY PARIS
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C O N F I D E N T I A L SECTION 1 OF 3 USBERLIN 0759

E.O.11652: GDS
TAGS: PGOV, BQG, AKB
SUBJECT: LORENZ-DRENCKMANN TRIAL: SUGGESTION TO WITHDRAW
CHARGE OF COERCION OF FEDERAL AND LAND ORGANS

REF: (A) BONN 5694, (B) SURENA/WHITLOCK TELCON, (C) USBERLIN 290,
(D) 77 USBERLIN 2006, (E) 77 STATE 239271, (F) 77 USBERLIN 2649,
(G) 77 BONN 13242

SUMMARY: WE HAVE RECEIVED REPORTS FROM BRITISH AND FRENCH LEGAL
ADVISERS THAT FEDERAL PROSECUTOR, OBERLE, IN CHARGE OF PROSECUTION
OF SUBJECT TRAILA, MAY CONSIDER DROPPING CHARGE OF COERCION AGAINST
FEDERAL AND LAND CONSTITUTIONAL ORGANS, AND THAT OBERLE IN SUCH
AN EVENT WOULD WISH TO RECEIVE ALLIED SIGNAL CONCURRENCE
(OR SYMPATHY) WITH WITHDRAWAL OF CHARGE. USBER IS STRONGLY
OF OPINION THAT ALLIES SHOULD STAY ENTIRELY OUT OF QUESTION
WHETHER OR NOT HIS CHARGE SHOULD BE DROPPED. END SUMMARY.

1. AS PART OF HIS OVERT AND APPARENTLY SINCERE CAMPAIGN TO HAVE
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CONTACT AND TO BE COOPERATIVE WITH THE ALLIES, OBERLE, THE
CHIEF FEDERAL PROSECUTOR IN BERLIN AND LEADER OF THE FEDERAL
PROSECUTION TEAM IN THE UPCOMING (11 APRIL) TRIAL OF THE
2 JUNE MOVEMENT DEFENDANTS, INVITED THE ALLIED LEGAL
ADVISERS TO DINNER AT HIS RESIDENCE ON 15 FEBRUARY. DUE
TO OFFICIAL TRAVEL REQUIREMENTS, US LEGAL ADVISER DID
NOT ATTEND.

2. AFTER DINNER OBERLE DISCUSSED THE UPCOMING TRIAL. AS REPORTED TO US BY THE BRITISH LEGAL ADVISER (AUST), AMONG OTHER THINGS OBERLE REFERRED TO THE CHARGE OF COERCION AGAINST THE CONSTITUTIONAL ORGANS OF THE FEDERATION AND THE LAENDER (NORTH RHINE WESTPHALIA, BAVARIA AND BERLIN). THIS CHARGE IS BASED ON PARA 105 OF THE PENAL CODE WHICH IN INFORMAL TRANSLATION READS AS FOLLOWS:

BEGIN TEXT

COERCION OF CONSTITUTIONAL AUTHORITIES

SECTION I

"WHOEVER COERCES BY FORCE OR BY THREAT OF FORCE

1. A LEGISLATIVE BODY OF THE FEDERATION OR A LAND OR ANY OF ITS COMMITTEES

2. THE NATIONAL FEDERAL ASSEMBLY OR ONE OF ITS COMMITTEES OR

3. THE GOVERNMENT OR THE CONSTITUTIONAL COURT OF THE FEDERATION OR OF ONE OF THE LAENDER

NOT TO EXERCISE THEIR POWER OR TO EXERCISE IT IN A CERTAIN WAY, WILL BE PUNISHED WITH IMPRISONMENT FROM 1 TO 10 YEARS.

SECTION II

IN LESS SEVERE CASES THE PUNISHMENT CAN BE 6 MONTHS
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TO 5 YEARS IMPRISONMENT.

END TEXT

2. THIS PROVISION IS PART OF THE REVISED EDITION OF THE GERMAN PENAL CODE PROMULGATED IN 1975 (BGBL.I, S.1) AND EXTENDED TO BERLIN THE SAME MONTH (JANUARY 1975, GVBL 1975, S.426). THE PROVISION WAS EXTENDED TO BERLIN WITHOUT ALLIED RESERVATIONS. TO OUR KNOWLEDGE, THIS PROVISION HAS NEVER BEFORE BEEN RELIED UPON IN A PROSECUTION IN GERMANY (BONN MAY WISH TO CONFIRM THIS INFORMATION).

3. OBERLE MENTIONED IN CONNECTION WITH THIS CHARGE THAT THERE WAS A POSSIBILITY THAT DEFENSE COUNSEL MIGHT SEEK TO CALL AS WITNESSES THE FEDERAL CHANCELLOR AND OTHER LEADING POLITICAL FIGURES, E.G. MINISTERS PRESIDENT. DEFENSE COUNSELS' OBJECTIVE WOULD BE TO POLITICIZE THE TRIAL. OBERLE NOTED THAT THE COURT MIGHT OR MIGHT NOT ACCEDE TO SUCH A REQUEST. AUST REPORTED THAT OBERLE, RECALLING THE ALLIED PREFERENCE TO AVOID POLITICIZING THE TRIAL, STATED THAT IF THE TAKING OF EVIDENCE FROM PROMINENT POLITICIANS WOULD

CAUSE PROBLEMS FOR THE ALLIES, THE PROSECUTION
WOULD, WITH RELUCTANCE, BE PREPARED TO DRP THE COER-
SION CHARGES.

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SP-02 SS-15 NSCE-00 SSO-00 ICAE-00 INRE-00 /064 W
-----104351 041705Z /42

O R 041450Z APR 78
FM USMISSION USBERLIN
TO SECSTATE WASHDC IMMEDIATE 6546
INFO AMEMBASSY BONN IMMEDIATE
INFO AMEMBASSY BERLIN
AMEMBASSY LONDON
AMEMBASSY MOSCOW
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4. THE FRENCH LEGAL ADVISER (PEIFFER) REPORTED OBERLE'S
COMMENTS TO FRENCH EMBASSY IN BONN WHICH SOMETIME IN
MARCH RAISED THE SUBJECT WITH THE US AND BRITISH BONN
GROUP REPRESENTATIVES. AUST AND PEIFFER THEN RECEIVED
INSTRUCTIONS FROM THEIR BONN EMBASSIES TO ELICIT
FURTHER DETAILS FROM OBERLE. THIS WAS DONE 28 MARCH.

5. THE BRITISH AND FRENCH REPORTS OF OBERLE'S FURTHER
REMARKS ARE NOT IDENTICAL. ACCORDING TO AUST, OBERLE
MADE IT VERY CLEAR THAT HE WAS NOT REPEAT NOT PRO-
POSING THAT THE CHARGES CONCERNING BLACKMAILING CON-
STITUTIONAL ORGANS OF THE FEDERATION AND OF THE LAENDER
SHOULD BE DROPPED AT THE BEGINNING OF THE TRIAL. HE
WOULD ONLY PROPOSE THAT THEY SHOULD BE DROPPED IF
THE DEFENSE USED THE CHARGES AS AN EXCUSE FOR MAKING
THE TRIAL MORE POLITICAL. FURTHERMORE, AUST REPORTED
THAT OBERLE WOULD NOT CONSIDER DROPPING THE CHARGES
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UNLESS THE ALLIES TOLD HIM THAT THEY WOULD BE IN FAVOR OF IT. HE WOULD NOT NEED THIS IN WRITING BUT HE WOULD NEED A SIGNAL FROM US IN ORDER TO HELP JUSTIFY HIS DECISION TO HIS SUPERIORS. ON THE OTHER HAND, HE SAID THAT HE WOULD NOT HAVE TO GET THE AGREEMENT OF HIS SUPERIORS BEFORE DROPPING THE CHARGES. HE WOULD ONLY HAVE TO JUSTIFY HIS ACTION AFTERWARDS. HE HAD IN FACT MENTIONED THE MATTER TO GENERAL BUNDESANWALT (THE CHIEF FEDERAL PROSECUTOR) REBMAN WHO DID NOT REACT UNFAVORABLY TO IT. ALTHOUGH HE WOULD NEED THE COURT'S CONSENT BEFORE THE CHARGES COULD BE DROPPED, HE WOULD NOT HAVE TO GIVE THE COURT ANY REASONS AND OBERLE CONSIDERED THAT, ALTHOUGH IN THEORY THE COURT COULD REFUSE HIS APPLICATION, IT WOULD IN PRACTICE BE GRANTED.

6. ON THE OTHER HAND, PEIFFER REPORTED THAT HE UNDERSTOOD OBERLE TO SAY THAT HIS DECISION TO DROP THE CHARGE WOULD BE BASED ON ISSUES OF TRIAL PROCEDURE. OPPORTUNITY AND PRACTICALITY - ISSUES WHICH THE PROSECUTION LEADER CAN ALWAYS HANDLE HIMSELF AND WHICH ONE NEED NOT REFER TO THE GENERAL BUNDESANWALT. ACCORDINGLY, OBERLE WOULD NOT SEEK ALLIED CONCURRENCE TO DROPPING THE CHARGE, BUT RAHTER WOULD SEEK A SIGNAL FROM THE ALLIES THAT SUCH AN ACTION WAS SUPPORTED BY THE ALLIES. FURTHER, THE SIGNAL COULD BE GIVEN ORALLY AND WOULD IN NO WAY FIGURE IN OBERLE'S JUSTIFICATION TO THE COURT OF HIS ACTION; BUT WOULD BE REPORTED TO DEMONSTRATE TO HIS PRINCIPALS IN KARLSRUHE THAT THE FEDERAL AND ALLIED INTERESTS WERE SIMILAR.

7. SINCE THE AUST AND PEIFFER REPORTS DIFFERED IN SUBSTANCE, US LEGAL ADVISER (SURENA) TOOK ADVANTAGE
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OF 31 MARCH LEGAL COMMITTEE MEETING TO ELICIT CLARIFICATION. AUST AND PEIFFER ACKNOWLEDGED DIFFERENCES IN THEIR REPORTS AND EACH HELD TO HIS RECOLLECTION. (COMMENT: WE WOULD TEND TO PLACE GREATER CREDENCE IN PEIFFER REPORT SINCE HIS GERMAN IS FLUENT AND AUST'S IS NOT. FURTHER COMMENTS OF PEIFFER, IMMEDIATELY BELOW, SUGGEST TO US THAT HE MORE FULLY UNDERSTOOD OBERLE'S NUANCED PROPOSAL).

8. AT LEGAL COMMITTEE MEETING PEIFFER ELABORATED ON HIS UNDERSTANDING OF OBERLE PORPOSAL. ACCORDING TO

PEIFFER, OBERLE IN ESSENCE SEEKS SOME SUPPORT FROM THE ALLIES IN DEFENDING TO KARLSRUHE HIS DECISION (IF HE MAKES IT) TO DROP THE CHARGE. PEIFFER OUTLINED THE FOLLOWING FACTORS WHICH OBERLE INDICATED COULD LEAD HIM TO DECIDE TO DROP THE CHARGE: (A) THE APPLICABLE PROVISION OF LAW HAS NEVER BEFORE BEEN TESTED; (B) THEREFORE, THERE EXISTS NO PRECEDENT TO ASSIST THE PROSECUTION OR COURT; (C) THEREFORE, PROSECUTING THE CHARGE FOR THE FIRST TIME MAY GIVE RISE TO UNWANTED COMPLAINTS; (D) THE KIDNAPPING CHARGES ALONE WOULD CARRY A STIFFER PENALTY THAN THE COERCION CHARGE AND SHOULD INVOLVE FEWER DIFFICULTIES TO PROVE; (E) AS A RESULT OF PAST TERRORIST TRIAL MISADVENTURES, FRG (APPARENTLY) HAS POLICY TO TRY AND CONVICT ACCUSED TERRORISTS AS EXPEDITIOUSLY AS POSSIBLE; AND (F) PROSECUTION OF COERCION CHARGE IS LIKELY TO LEAD TO GREAT POLITIZATION OF THE TRIAL CONTRARY TO EXPRESSED ALLIED INTERESTS.

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SP-02 SS-15 NSCE-00 SSO-00 ICAE-00 INRE-00 /064 W
-----105159 041704Z /41

O R 041500Z APR 78
FM USMISSION USBERLIN
TO SECSTATE WASHDC IMMEDIATE 6547
AMEMBASSY BONN IMMEDIATE
INFO AMEMBASSY BERLIN
AMEMBASSY LONDON
AMEMBASSY MOSCOW
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9. THREE LEGAL ADVISERS DISCUSSED POINT 8 (F) AT LENGTH. IT IS NOW CLEAR THE FRENCH HAVE DIFFERENT IMPRESSION OF ALLIED CAUTIONS CONVEYED TO FRG ON CONDUCT OF TRIAL. THIS MAY RESULT FROM FACT THAT OF THREE ALLIES, FRENCH HAD STRONGEST RESERVATIONS ABOUT CONDUCT OF TRIAL IN BERLIN WITH INVOLVEMENT OF FEDERAL PROSECUTORS.

10. SURENA AND AUST ARGUED THAT ALLIED GUIDELINES TO FEDERAL PROSECUTOR (I.E. FRG) WERE NOT DIRECTED GENERALLY TO THE CONDUCT OF THE PROSECUTION AT THE TRIAL; ONLY EXCEPTION MIGHT ARISE WHERE FEDERAL PROSECUTOR OFFERED ASSERTIONS AT TRIAL CONCERNING ALLIED RIGHTS AND RESPONSIBILITIES IN BERLIN. RATHER, AUST AND SURENA REGARDED ALLIED GUIDELINES ON NON-POLITICIZATION AS DIRECTED TO PUBLIC STATEMENTS OF AND PUBLIC HANDLING OF TRIAL ISSUES BY GOVERNMENT OFFICIALS INVOLVED IN TRIAL. PEIFFER ARGUED THAT ALLIED INJUNCTION TO AVOID POLITICIZATION WAS BROADER AND THAT OBERLE HAD RIGHTLY INTERPRETED ALLIED INJUNCTION AND THAT CONFIDENTIAL

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ALLIES WOULD CAUSE DAMAGE TO COOPERATIVE SPIRIT OBERLE WAS DEMONSTRATING IF WE GAVE HIM NO REPEAT NO ANSWER. FOR LEGAL REASONS STATED BELOW, AUST AND SURENA STRONGLY ARGUED THAT WE SHOULD RESPOND TO AN OBERLE REQUEST FOR ALLIED VIEWS ON DROPPING THE CHARGE WITH A "WE HAVE NO REPEAT NO VIEWS ON THE SUBJECT. IT IS YOUR DECISION" ANSWER.

11. ADDRESSEES WILL RECALL THAT IN REACTION TO THE CONTROVERSY INITIATED BY SOVIET PROTESTS ON THE TRIAL, CAPITALS DIRECTED THE ALLIED KOMMANDATURA TO ISSUE A PRESS STATEMENT ON THE ROLE OF THE FEDERAL PROSECUTOR IN THE TRIALS (REFTEL G), AND TO ANSWER LETTER FROM DEFENSE COUNSELS (REFTEL F). IN ADDITION, CAPITALS RESPONDED TO SOVIETS ALONG SAME LINES (REFTEL E). IN ESSENCE THOSE STATEMENTS HELD THAT THE PARTICIPATION OF THE FEDERAL PROSECUTOR IN THE TRIAL WAS ENTIRELY CONSISTENT WITH ALLIED RIGHTS AND RESPONSIBILITIES IN BERLIN SINCE IT WAS BASED ON FRG LEGISLATION WHICH HAD BEEN EXTENDED TO BERLIN WITH THE CONCURRENCE OF THE ALLIES. THE SAME RATIONALE EXPLAINS WHY THE PROSECUTION IN BERLIN OF INDIVIDUALS ON CHARGES OF COERCION AGAINST THE BUND OR LAENDER AUTHORITIES IS ALSO CONSISTENT WITH ALLIED RIGHTS AND RESPONSIBILITIES. THUS, WE WOULD SERIOUSLY UNDERMINE OUR POSITION (BOTH LEGAL AND PUBLIC) IF IN ANY WAY WE CONCURRED OR WERE SEEN TO CONCUR IN DROPPING THIS CHARGE.

12. WE CONSIDER IT UNFORTUNATE THAT BRITISH BONN GROUP REP HAS RAISED MATTER WITH FRG IN BONN GROUP (REFTEL A). WE WOULD HOPE THAT ISSUE CAN STILL BE PUT TO REST TRIPARTIELY FOR REASONS EXPRESSED ABOVE. ACCORDINGLY, WE RECOMMEND THAT ALLIED BONN GROUP REPS CONFIDENTIAL

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AGREE TO INSTRUCT BERLIN MISSION LEGAL ADVISERS TO
INFORM OBERLE ALONG FOLLOWING LINES:
(A) ANY DECISION TO PURSUE OR NOT PURSUE CHARGE OF COERCION
IS OBERLE'S DECISION TO BE REACHED IN MANNER HE AS
PROSECUTOR NORMALLY REACHES SUCH A DECISION; AND
(B) ALLIES APPRECIATE CONSIDERATION IMPLICIT IN
OBERLE'S OFFER TO CONSULT WITH US ON THIS MATTER,
HOWEVER ALLIES HAVE NO OPINION ON THE DECISION.

13. PEIFFER WAS ADAMANT IN HIS VIEW THAT ALLIES
SHOULD RESPOND IN SOME AFFIRMATIVE MANNER, NO MATTER
HOW SLIGHT, TO OBERLE'S EFFORTS AT COOPERATION. HE
CONSIDERED THIS NECESSARY (A) TO ENCOURAGE OBERLE
TO CONTINUE TO COOPERATE WITH US, AND (B) BECAUSE
PEIFFER BELIEVES OBERLE HAS PROPERLY INTERPRETED ALLIED
INJUNCTIONS TO AVOID POLITICIZATION OF THE TRIAL.
WHILE WE DISAGREE WITH THE LATTER POINT, WE CONSIDER
THAT THE FIRST HAS SOME MERIT. ACCORDINGLY, SHOULD
THE FRENCH (OR BRITISH) IN BONN FEEL AS STRONGLY AS
PEIFFER ON THIS MATTER WE WOULD SUGGEST AS THE ULTI-
MATE FALLBACK THAT THE MISSIONS BE AUTHORIZED TO AD-
VISE OBERLE THAT IN THE EVENT HE SEEKS OUR VIEWS ON
DROPPING THE COERCION CHARGE, WE WOULD AUTHORIZE HIM
TO ADVISE HIS SUPERIORS ON A HIGHLY CONFIDENTIAL BASIS
ALONG FOLLOWING LINES:

BEGIN TEXT

HE HAS BEEN ADVISED BY THE ALLIES THAT HIS DECI-
SION IS CONSISTENT WITH THE ALLIED DESIRE TO HAVE AS
LITTLE POLITICAL DIFFICULTY WITH THE TRIAL AS POSSIBLE.
END TEXT

14. PURPOSE OF SUCH OR SIMILAR STATEMENT WOULD BE TO
AVOID IMPLICATION THAT ALLIES PARTICIPATED IN REACHING
THE DECISION. NONETHELESS, IT CAN BE MISINTERPRETED,
AND FOR THAT REASON USBER HOPES IT WILL NOT REPEAT NOT
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BE NECESSARY TO EMPLOY IT. K. GEORGE

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Message Attributes

Automatic Decaptioning: X
Capture Date: 01 jan 1994
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: LAND, TRIALS
Control Number: n/a
Copy: SINGLE
Draft Date: 04 apr 1978
Decaption Date: 01 jan 1960
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 20 Mar 2014
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1978USBERL00759
Document Source: CORE
Document Unique ID: 00
Drafter: n/a
Enclosure: n/a
Executive Order: GS
Errors: N/A
Expiration:
Film Number: D780145-0549
Format: TEL
From: USBERLIN
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1978/newtext/t19780492/aaaadatz.tel
Line Count: 379
Litigation Code IDs:
Litigation Codes:
Litigation History:
Locator: TEXT ON-LINE, ON MICROFILM
Message ID: 360c7db6-c288-dd11-92da-001cc4696bcc
Office: ACTION EUR
Original Classification: CONFIDENTIAL
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 7
Previous Channel Indicators: n/a
Previous Classification: CONFIDENTIAL
Previous Handling Restrictions: n/a
Reference: 78 BONN 5694, 78 USBERLIN 290, 77 USBERLIN 2006, 77 STATE 239271, 77 USBERLIN 2649
Retention: 0
Review Action: RELEASED, APPROVED
Review Content Flags:
Review Date: 07 jun 2005
Review Event:
Review Exemptions: n/a
Review Media Identifier:
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
SAS ID: 3075265
Secure: OPEN
Status: NATIVE
Subject: LORENZ-DRENCKMANN TRIAL: SUGGESTION TO WITHDRAW CHARGE OF COERCION OF FEDERAL AND LAND ORGANS
TAGS: PGOV, BQG, AKB
To: STATE BONN
Type: TE
vdkgvwkey: odb://SAS/SAS.dbo.SAS_Docs/360c7db6-c288-dd11-92da-001cc4696bcc
Review Markings:
Sheryl P. Walter
Declassified/Released
US Department of State
EO Systematic Review
20 Mar 2014
Markings: Sheryl P. Walter Declassified/Released US Department of State EO Systematic Review 20 Mar 2014